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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1049

DWIGHT D. KINNE and CHARLES H. KINNE, and LELIA M. KINNE,
Petitioners,

vs.

STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

W. N. MULLEN,
315 Montgomery Street, San Francisco 4, California,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Bank of America Building, Willows, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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(Petition)

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit

Court of Appeals for the Ninth Circuit, entered in the above case December 11, 1944, reversing a judgment of the United States District Court for the Northern District of California in an agricultural composition and extension proceeding under the National Bankruptcy Act.

OPINION BELOW.

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 51) is reported in 146 F. (2d) 8.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 11, 1944. (R. 55.) Petition for rehearing was duly filed January 10, 1945, and was denied by the Circuit Court of Appeals January 17, 1945, without comment. (R. 56.) The jurisdiction of this Court is invoked under Sections 24 and 25 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938 (USCA Title 11, Sec. 47(c)), and Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (USCA Title 28, Sec. 347).

QUESTIONS PRESENTED.

1. Where a conditional sales contract for the sale of farm land in California calls for installment pay-

ments, and makes time of the essence, and where the purchaser has been in default for a period of years but negotiations for compromise and adjustment (aided by the Farm Security Administration) continue while the purchaser remains in possession, and then a notice of default purporting to "hereby terminate" the rights of the buyer is given, without affording the buyer an opportunity to pay the full amount due and receive a deed, did not the Circuit Court of Appeals err in reversing the order of the Conciliation Commissioner which had been confirmed by the District Court, such reversal in effect being contrary to established California law on the subject of forfeiture under conditional sales contracts for the sale of land?

2. Where an appeal is taken to the Circuit Court of Appeals from a decision of the District Court affirming an order of the Conciliation Commissioner in an agricultural composition and extension proceeding, where said order of the Commisioner had been made upon findings of fact after full hearing of many witnesses, and where no serious, or any, error has been pointed out by appellant, did not the Circuit Court err in deviating substantially from the established law announced by the decisions of this Court, the decisions of many Circuit Courts, and Rule 52a of the FRCP that such findings and decision of the District Court shall not be set aside unless there be a plain and clear showing of error?

3. Where an appeal is taken to the Circuit Court of Appeals from a decision of the District Court

affirming an order of a Conciliation Commissioner made pursuant to full hearing of oral and documentary evidence comprising 179 pages of transcript, and the appellant fails to include such transcript of testimony in the record on appeal, and such record is not available to the Circuit Court on the appeal, did not the Circuit Court depart from the accepted and usual course of judicial proceedings in a material and prejudicial manner by disregarding the facts found below and by drawing its own inferences from facts merely assumed by it and by reversing the District Court?

STATEMENT.

Petitioners are farmers who sought relief under the agricultural composition and extension provisions of the Bankruptcy Act by filing their petition February 26th, 1943, which was referred to the Conciliation Commissioner March 1st, 1943. (R. 2-5.) The instant proceeding arose by the filing by respondent School of a petition to strike from the debtors' schedule all of the farm land claimed by the farmer-debtor. (R. 17; 51.) The motion to strike was heard by the Conciliation Commissioner, an attorney at law of long experience; evidence, both oral and documentary was considered. The transcript of testimony and evidence before the Commissioner comprises 179 pages, but this was not included by appellants in the record on appeal to the Circuit Court of Appeals, and that Court did not have such evidence before it. (R. 12.) The petition to strike was denied by the Commissioner

(R. 17), whereupon respondent sought review by the District Court (R. 31), and thereafter, on February 21st, 1944, the District Court approved the action of the Conciliation Commissioner. Appeal to the Circuit Court of Appeals for the Ninth Circuit followed, the Circuit Court reversing the decision. (Opinion of Circuit Court, R. 51.) Petition for rehearing was duly filed, and denied. (R. 56.)

The sole issue below was the ownership of the farm land in Tehema County, California, on the date of the filing of the petition for agricultural composition and extension. That issue is to be determined by California state law. The farm land in question was purchased by petitioners Kinne from the predecessor of respondent Starr King School, under a conditional sales contract calling for installment payments and making time of the essence. The precise law involved is the California rule respecting forfeiture under such a contract *where there are equitable considerations of waiver, estoppel, or laches taking the case out of the class of strict forfeitures* illustrated by *Glock v. Howard,* 123 Cal. 1, and putting it within the rule of *Boone v. Templeman,* 158 Cal. 290, which requires, upon the showing of delay in effecting forfeiture, that the creditor, by notice, give the debtor a reasonable time within which to pay the full balance due and receive a deed—Tender of a deed by the seller being essential to effect forfeiture.

The Conciliation Commissioner found the following facts, which are not disputed in any material point (that they are not disputed is apparent by the fact

that respondent (appellant below) did not incorporate the transcript of testimony in the record sent up to the Circuit Court. (R. 12).) The Commissioner concluded that forfeiture of the land under the contract had not taken place, and refused to strike the same from the schedule. The District Court confirmed that order.

FACTS.

(1) *Contract of sale.* March 29, 1937, respondent School sold thirty-eight acres of farm land in Tehama County, California, to petitioners, on a conditional sales contract, wherein time is made of the essence. (R. 37.) Petitioners went into possession, are now on the land, and have been on it continuously with the knowledge of respondent, farming and improving it.

(2) *Default in payments.* It is not denied that petitioners fell in arrears in payments in the early days of the contract, and continued thus to the filing of the petition in bankruptcy.

(3) *Efforts to adjust.* This is one of the most important facts in the case, the issues having been resolved in favor of the petitioners by the trier of facts, but wholly disregarded and nullified by the Circuit Court.

The relationship between seller and buyer was friendly and cooperative until February, 1942. The Conciliation Commissioner found that "for several

months prior to February, 1942, the Farm Security Administration, at Red Bluff, California, acting for and on behalf of the debtors, endeavored to secure a scale down of the balance due under the contract or to otherwise adjust the differences between the School and the Kinnes, even going so far as to contact the Federal Land Bank and secure its advice as to how much it would loan on the property and submit the bank's figures to the School." (R. 26-27.)

(4) *First notice of default,* February 24, 1942.* No solution was found, and on February 24, 1942 respondent served a notice of intention to declare a forfeiture if the entire balance due was not paid by March 29, 1942. (R. 42-43.)

(5) *Continued efforts to adjust.* Petitioners remained on the premises, farming and improving it; they did not pay according to the demand of February 24th; they were not molested in their possession. The Conciliation Commissioner found as a fact that efforts to adjust the differences and effect a compromise or extension continued until January 18, 1943, the representative of the Farm Security Administration being active in that regard. The exact

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*This first notice of default was merely a declaration of an intention to declare a forfeiture at the end of a specified period, and was not a declaration that at the end of the period the purchasers' right would be forfeited. This point was most ably analyzed and discussed by the Conciliation Commissioner in his order denying petition to strike. (See R. 23-26.) It is to be noted that the respondent itself must have considered the first notice ineffectual after the lapse of the year, for it gave the second notice of February 10, 1943. (See infra, point 7 of the statement.

language of the Commissioner is this: "Subsequent to that date (February 24, 1942) and continuing until late in 1942, the Farm Security Administration continued to correspond with the School looking to an adjustment of the contract, but so far as the record shows, received no reply to any of its letters until January 18, 1943, when Mr. Duschak wrote to the Farm Security Administration, advising that since no solution had been found, and the debtors had failed to bring the contract to date, the School had negotiated with another purchaser of the land. This letter of the 18th was apparently the first indication that the debtors or the Farm Security Administration had that the School was no longer interested in working out a new deal with the debtors, but had definitely concluded to cancel the rights under the contract." (R. 27.)

This letter of the 18th of January was, indeed, the first notice to anyone that the School was not interested in further negotiation. The Commissioner, however, did not note in his opinion a very striking portion of the testimony, that of a letter from respondent's agent, Mr. Duschak, to Dave Jones of the Farm Security Administration, dated December 31, 1942, in which it was stated in part:

> "Apology is due you for my failure to reply to your letter of October 15th, 1942, and I now have your letter of December 15th. The reply was delayed *in the hope I might come to Capay Rancho personally and look into the situation* with Mr. Kinne, but circumstances have prevented it * * *"

The foregoing is found in the Rep. Tr., page 87. It was called to the attention of the Circuit Court on petition for rehearing, but that Court persisted in its own interpretation of the few facts presented to it and which it assumed, and swept away all of petitioners' property rights in direct and flagrant disregard of the overwhelming evidence that petitioners had been lulled into a sense of security by the protracted compromise negotiations extending over a period of many years.

It must be noted particularly in this regard that the foregoing finding of fact was made after the hearing of the testimony of the interested parties, and of the representative of the Farm Security Administration. *This testimony was not before the Circuit Court, yet that Court has wholly and completely reversed the judgment below by drawing its own inferences from facts not before it.* (R. 54.)

(6) *Improvements and increased value.* The petitioners, between the notice of default of February, 1942, and February, 1943, made substantial improvements, repairs, and did maintenance work. The value of the premises was increased by the efforts of the petitioners to $8,000.00 or nearly three times the amount against it. (R. 29-30.)

(7) *Second notice of default,* February 10, 1943.* In spite of the failure of respondent to take any

*See discussion in brief annexed hereto on subject of California Law on requirements of notice to effect forfeiture after lapse of time while buyer in default.

action following the first notice a year earlier; in spite of continued negotiations for composition; in spite of continued peaceable possession by petitioners, who continued farming the land and improving it, suddenly came the notice of February 10, 1943, "reciting that since the debtors had failed to pay the delinquency on or before March 29, 1942, as demanded in the notice of February 24, 1942, the School '*hereby* terminates all your rights in and to the said real property and premises hereinafter described and demands that you surrender possession'." (R. 19.)

(8) Petitioners have been in possession continuously since the purchase in 1937, have farmed the property well, have increased its value, and seek only the application of the salutary provisions of the agricultural composition and extension provisions of the bankruptcy law.

REASONS FOR GRANTING THE WRIT.

1. DECISION OF THE CIRCUIT COURT OF APPEALS IS A DECISION OF AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The California law is quite certain that where there are equitable circumstances, such as estoppel, waiver, or laches, the strict forfeiture provisions of a conditional sales contract on land are to be relaxed to the extent that before a forfeiture can be effected, the seller must give the buyer an opportunity to pay up in

full, and must tender a deed to be delivered upon such payment. *Boone v. Templeman,* 158 Cal. 290.

The question is important because it strikes at the very core of our economic stability. The very statute under which this whole proceeding arose, (Agricultural extension and composition provisions of the Bankruptcy Act) is designed to give every farmer an opportunity to work out a fair and economic adjustment of his financial problems. The whole salutary endeavor of that legislation is frustrated by the decision of the Circuit Court herein running contrary to California law. The evidence contained in the record before the Circuit Court (the complete reports of the Conciliation Commissioner, R. 6-10; 17-30), is overwhelmingly in substantiation of the existence of facts bringing the case within *Boone v. Templeman.*

The Circuit Court relied heavily upon the case of *Federal Farm Mortgage Co. v. Davis,* 132 F. (2d) 663. That case correctly states the law in situations not involving equitable considerations, but it does not touch upon the situation established by the evidence in the case at bar, to wit, a case where a *course of dealing over a long period of time* has given the buyer to understand that his prior and continuing default will not be seized upon as a means of forfeiture.

2. IMPORTANT QUESTION OF FEDERAL LAW DECIDED IN WAY WHICH PROBABLY CONFLICTS WITH DECISIONS OF THIS COURT.

The basis of the decision of the Circuit Court of Appeals is that even though the evidence is not before it in the record (R. 46), and no error whatever is pointed out by appellant other than appellant's dissatisfaction with the inferences and conclusions drawn by the trier of facts, the Circuit Court may yet disregard the facts found by the Conciliation Commissioner, and the inferences and conclusions therefrom, which were affirmed by the District Court, and reverse the District Court. It is petitioner's position that in making this decision the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court in *Warren v. Keep* (1894), 155 U. S. 265, and *Furber v. Ferris* (1892), 145 U. S. 132, and Rule 52a, FRCP.

In *Warren v. Keep* the action was based on alleged infringement of patents. The matter was referred to a Master, and decision entered in conformity therewith. At page 267 the Court's opinion states: "There was a considerable amount of this evidence, and it was, to some extent, conflicting. The Master acted in view of this evidence, and the Court below concurred in his finding, except in some unimportant particulars. As no obvious error or mistake has been pointed out to us, their conclusions must be permitted to stand." (Citations.)

In *Furber v. Ferris,* supra, this Court, speaking through Mr. Justice Brewer, said:

"The gist of this controversy was the alleged negligence of the receiver in failing to maintain a reasonably safe crossing. This presented mainly a question of fact. Upon the testimony, both the master and the Circuit Court found that there was no negligence, and, while such determination is not conclusive, it is very persuasive in this court. In *Crawford v. Neal,* 144 U. S. 585, 596, it was said:

'The cause was referred to a master to take testimony therein, "and to report to this Court his findings of fact and his conclusions of law thereon." This he did, and the Court, after a review of the evidence, concurred in his finding and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.' (Citations omitted.)

That rule compels an affirmance of the decree in this case."

Rule 52a, FRCP, states a rule in substantial conformity with the decisions of this Court, and the almost uniform holdings of the Circuit Courts.

Importance of question. The importance of the adherence by the Circuit Courts to such a long-established and well-settled mode of procedure on appeal is particularly important in cases such as the one at bar, involving as it does a litigant who is admittedly and obviously in strained financial circumstances. That

such cases are numerous, cannot be denied. That our law should afford equal justice to a poor litigant is also a proposition that cannot be denied. The harmful effect of the Circuit Court's departure in this case is apparent. The preparation of a record on appeal is a matter of considerable expense; the attendance of counsel at oral argument when the Court is held over 200 miles from the residence of the litigant is also of considerable expense. Is it not the normal, and proper procedure for a litigant successful before the Conciliation Commissioner, and successful before the District Court, on substantial evidence, to consider carefully the necessity for augmenting the record prepared by the appellant, and the need of appearing for oral argument on the facts of the case? And where appellant does not choose to send up the record of testimony, and does not choose to point out any serious error to the Circuit Court in its brief or otherwise, is not a litigant in the federal courts entitled to rely upon the above-stated principles of appellate proceduce? An analysis of the case at bar reveals no ground or basis whatever for reversal; the opinion of the Circuit Court obviously bases reversal on its *own interpretation of facts* differing from the interpretation put on those facts, (mainly matters of the conduct of, and negotiation between, the parties) (R. 54.) Had petitioner here the slightest indication of such flagrant departure from established principles, he could have, and undoubtedly would have, insisted upon the full transcript going up to the Circuit Court, and would have appeared before that Court and

argued the *facts* and inferences, if they were to be the turning point of the case. The decision of this Court means that no litigant is safe in relying on the record in the courts below; all litigants in all cases must expend considerable sums of money to defend against the possibility that some appellate Court is going to take unto itself the function of a trial Court, and in effect grant a trial *de novo,* but without the evidence, and without the litigant's having an opportunity to clarify errors as to facts assumed by the Appellate Court.

The matter is of importance to all litigants in the federal courts. It is of paramount importance to parties in bankruptcy litigation; it is of tremendous importance to a farmer-debtor in a farm compromise and extension proceeding.

Finally, the question is of utmost importance in the fair and equitable administration of the salutary provisions of the farm compromise and extension provisions of the Bankruptcy Law.

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3. **IN MAKING THE DECISION IN THIS CASE THE CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO CALL FOR AN EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.**

No transcript of testimony was sent up to the Circuit Court. So far as evidence is concerned, the Circuit Court had before it only the findings and con-

clusions of the Conciliation Commissioner, affirmed by the District Court (R 6-10; 17-30.) These were presumptively correct, and in the absence of a clear showing of error were to be sustained, even where the record is before the Circuit Court; *a fortiori* where the evidence the basis of the decision below is not before the Appellate Court.

In *Bernards v. Johnson,* 103 F. (2d) (9th Cir.), a case involving the effect of foreclosure and title to property, the Court, speaking through Justice Mathews, said:

> "The orders appealed from are based on findings. The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct."

And again, in *Irving Trust Co. v. Nelson,* 59 F. (2d) 553, 559, it is said:

> "Where the facts upon which an order is based are in dispute, this court *must assume, in the absence of a record containing all the evidence,* that the findings upon which the order is based are justified."

Importance of question. A litigant should be entitled to rely upon the clear enunciation of the law, on matters of appellate practice and the scope of review as well as on other matters. The case at bar illustrates the vital importance of such a question, and the gross miscarriage of justice where there is a deviation from established policy. It is obvious from the rec-

ord that petitioners are in strained financial circumstances. Many litigants in the federal courts are in the same condition. We announce to the world equality and equal justice for all, rich or poor. When a litigant has expended all that he can scrape together to defend himself in the lower federal courts, and has been successful before the Conciliation Commissioner, and before the District Court, is he not entitled to rely upon the record in his case on appeal *in conformity with established law?* A full review of the record in the case at bar, including briefs on appeal and petition for rehearing, establishes the soundness of petitioners' position, and fully justified their determination to permit the matter to go to the Circuit Court without going to additional expense to have the transcript prepared, and the heavy expense of sending counsel over 200 miles to argue the case orally. No practitioner of experience would have felt justified in asking his client to advance substantial sums of money for these purposes in the light of the record herein and under the law as stated.

But the Circuit Court of Appeals for the Ninth Circuit has taken upon itself the function of a trial Court; has in effect tried this case *de novo,* has ignored the principles of appellate practice and scope of review, and has reversed the District Court without any showing whatever of error having been made.

The continuance of such procedure by the Appellate Courts will undermine the administration of justice, and will give a great advantage to the wealthy

litigant, and sorely prejudice the litigant of moderate means.

This is a case for the exercise by this Court of its supervisory powers.

CONCLUSION.

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
March 12, 1945.

W. N. MULLEN,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Of Counsel.

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STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The facts are fully stated in the petition, *ante,* and will not be reviewed in detail. The essential points are these: Petitioners were the purchasers of farm land in California under a conditional sales contract calling for installment payments, making time of the essence. Petitioners were in default at an early date, and continued so.

The most important point for consideration is that the overwhelming evidence shows that over a period of years there were efforts to adjust the contract so as to permit the farmer-purchasers to put the land on an economically sound basis. A representative of respondent seller entered into these negotiations. Dave Jones, the agent of the Farm Security Administration, entered into the negotiations. In the meanwhile, petitioners farmed and improved the property, increasing its value threefold.

A notice of intended forfeiture was given February 26, 1942, naming March 29, 1942 as the deadline for full payment of the total purchase price. Payment was not made as called for, but *nothing was done by respondent pursuant to the notice. Negotiations for compromise continued* thereafter.

The Circuit Court of Appeals concluded, *without the evidence before it* and in direct disregard of the findings of the Conciliation Commissioner and the District Court that there was no intention to continue negotiation. But these highly pertinent facts stand uncontradicted in the record. They are recited in the Commissioner's findings (R. 6 and 17.) The transcript of testimony, athough not before the Circuit Court, fully substantiates these facts:

1. Nothing was done by respondent, after its notice of Feb. 26, 1942, to carry out its threat of forfeiture. Petitioners remained in possession.

2. The Farm Security Administration continued its activity in seeking a compromise or extension for petitioners. (R. 27.)

3. As late as December 31, 1942, almost a year after the said notice, respondent's agent wrote to the Farm Security Administration apologizing for delay in answering letters, and stating his desire to visit the ranch and see petitioners personally. (Red. Tr. p. 87.)

4. Respondent served a second notice of default on petitioners on February 10, 1943, purporting to effect immediate forfeiture, thus recognizing the continuance of the contract after the first notice, and the inefficacy of the first notice to effect forfeiture. (R. 43-45.)

ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in deciding an important question of local law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals erred in deciding an important question of federal law in a way which probably conflicts with decisions of this Court.

3. In deciding the case at bar the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise by this Court of its power of supervision.

ARGUMENT.

I. THE CALIFORNIA LAW IS THAT, UNDER SUCH FACTS AS WERE FOUND BY THE CONCILIATION COMMISSIONER AND CONFIRMED BY THE DISTRICT COURT, PETITIONERS' RIGHTS UNDER THE SALES CONTRACT WOULD NOT BE FORFEITED.

1. California law respecting forfeiture.

The leading California case relaxing the harsh rule of forfeiture of contracts for the sale of land is *Boone v. Templeman,* 158 Cal. 290. The principles enunciated in that case have been consistently followed, and said decision announces California law on the subject which should have been applied in the instant case. One of the most recent cases reaffirming *Boone v. Templeman* is *Industrial Land Co. v. Walker,* 61 Cal. App. (2d) 298.

The *Boone* case was a suit by a plaintiff to enforce specific performance of a contract for the sale of land, executed by Boone as purchaser and Templeman as seller. The contract was conditional, making time of the essence. Only one payment was made when due, all others being substantially overdue. July, 1906, when plaintiff was in substantial default in payment, Templeman, without any previous demand for performance, gave Boone a written statement purporting to rescind. Boone offered to pay in full, and asked for a statement. Templeman refused to accept any money, or to give a statement, but told Boone he would consider the matter and let him know. Nothing further was heard from Templeman. Boone again made an offer, in December, but he was referred to Templeman's attorneys. This suit was instituted by Boone.

Plaintiff contended that the conduct of Templeman amounted to a waiver of the condition that time should be of the essence, and of his right to declare a forfeiture for non-payment.

The principles are ably discussed by the Court, emphasis being placed on the continued possession of the premises by the purchaser, and judgment for defendant was reversed. The decision of the Court is based on the proposition that strict performance was waived by conduct, and that where the entire balance was due, *the vendor must, in order to put the buyer in default so as to declare a forfeiture, tender a deed and give the buyer a reasonable time to perform.*

Federal Farm Mortgage Co. v. Davis, 132 F. (2d) 663 *distinguished:*

The Circuit Court placed controlling reliance upon the case of *Fed. Farm Mort. Co. v. Davis,* supra. A careful reading of the opinion in that case reveals that it presented *no element whatever* of equitable relief from forfeiture; there was absolutely no element of estoppel, nor of waiver, nor of laches. It clearly was a case coming within the harsh rule of *Glock v. Howard,* 123 Cal. 1, the leading case in California establishing the harsh rule of forfeiture, cited in the *Federal Farm Mort. Co.* opinion.

It should be remembered throughout the consideration of this matter that the findings of fact were made by the Conciliation Commissioner upon voluminous evidence; these findings were approved by the District Court. *Nothing whatever* in the record be-

fore the Circuit Court contradicts or weakens the findings bringing the case within the relaxed rule of *Boone v. Templeman.*

In the *Federal Farm Mort. Co.* case the Circuit Court of Appeals for the Ninth Circuit cites in support of its strict construction the California case of *Ballard v. MacCallum*, 15 Cal. (2d) 439, 444. That case simply recognizes the rule of strict forfeiture where conditions so warrant, but it goes on to say that strict forfeiture may be avoided where equitable considerations are present. At page 444, the Court says:

> "But aside from these special situations our courts follow the accepted doctrine that equity will relieve even against an express provision for forfeiture."

And continuing in the following paragraph on page 444, the Court recognizes the abhorrence of the law for forfeitures:

> "In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that *the construction which avoids forfeiture must be made if it is at all possible.*"

The Circuit Court of Appeals for the Ninth Circuit went out of its way to work a forfeiture; it had to disregard facts found by the Conciliation Commissioner; it had to disregard facts and conclusions affirmed by the District Court, and it had to *draw its own inferences of fact* (contrary to established appellate rule) in order to declare the forfeiture in this case.

The California law of fairness and equity should be sustained. The granting of the writ herein is the only means whereby that can be accomplished.

2. **California law respecting the issues herein as being issues of fact.**

On motion to strike property from the debtors' petition, the Conciliation Commissioner determined that there was waiver or estoppel bringing the case within the California rule that no forfeiture could be effected without the seller first giving the buyer a reasonable opportunity to pay in full, coupled with a tender of a deed to be delivered upon full payment. This determination was one of fact bringing the case within the rules hereinafter discussed in this brief, to wit, that the findings of the Commissioner, confirmed by the District Court, are not to be set aside unless plainly erroneous.

> "* * * laches is always a question of fact, as is estoppel. To accurately and fairly determine the diligence of the party rescinding, every fact and circumstance illustrating his actions should be considered, and after such consideration by the trial Court, a reviewing Court is loath to disturb the holding if reasonably supported."
>
> "The defense of laches bears kinship to estoppel. Both are characteristic of equity. And, speaking generally, in applying the rules to given facts a Court will consider the equities present, the wrong to be prevented and the rights to be secured."
>
> *Long v. Los Altos Country Club*, 122 C. A. 116, 120-121.

"There is no hard-and-fast rule, either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. In addition to mere lapse of time, there must exist some circumstances from which the defendant may be prejudiced, or there must be such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. (Citation.) *Laches is a question of fact,* on the evidence, and must be determined by a *consideration of all the circumstances of each particular case.* (Kleinclaus v. Dutard, 147 Cal. 245.) It is a question *to be determined primarily and very largely by the trial Court, and an Appellate Court will not interfere with its discretion in this respect unless manifast injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence.* (Citations.)" (Emphasis added.)

Wolpert v. Gripton, 213 Cal. 474, 483.

"The question of laches is one for the determination of the trial Court and its conclusion thereon will not be set aside by an Appellate Court if it finds reasonable support in the evidence (citations)."

Kramer v. Associated Almond Growers, 111 C. A. 595, 601.

"Whether plaintiffs acted seasonably, and whether defendants were prejudiced by such delay, were *questions of fact for the trial Court.*"

Fry v. Board of Education, 17 Cal. (2d) 753, 761.

II. CONCURRENT FINDINGS OF A MASTER OR CONCILIATION COMMISSIONER AND THE DISTRICT COURT WILL NOT BE SET ASIDE UNLESS PLAINLY ERRONEOUS.

The status of a referee, master, and conciliation commissioner are the same so far as the force and effect of their findings of fact are concerned.

Steward v. Gauey, 116 F. (2d) 1010;
In re Miller, 111 F. (2d) 28.

In a case involving the determination of a question very similar in nature to that in the case at bar is *In re Penfield Distilling Co.,* 131 F. (2d) 694. We quote from the opinion:

> "This is an appeal from an order of the District Court sustaining the disallowance by the referee of a claim in bankruptcy. A single determinative issue of fact is presented: Is appellant Lyons, as he claims, a creditor; or is he, as was found by the referee and the district judge, a stockholder of the bankrupt corporation, the Penfield Distilling Company?
>
> Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, or anything less than a *demonstration of plain mistake.*

In *Brown v. Freedman,* 124 F. (2d) 151, the opinion of the First Circuit Court covers what petitioners believe to be the law in this regard. We quote from the opinion:

> "This is an appeal under Section 24, sub. a of the Bankruptcy Act, 11 USCA Sec. 47, sub.

a, from an order of the District Court affirming an order of a referee in bankruptcy sustaining a petition to reclaim and repossess certain machinery, and directing the defendant named therein, the appellant here, as trustee in bankruptcy of the International Chewing Gum Company to turn over the proceeds of the sale thereof to the appellee."

"Counsel for the appellant, both in his brief and in argument before us, evinces a misconception of the scope of judicial review in cases of this sort. In his brief he says that the District Court 'may disregard the findings of the referee even where the review shows only a difference as to the credibility of witnesses', and with reference to this Court he says, 'The view that concurrent findings of a referee and the Court shall not be reversed if not clearly erroneous is not applicable to this appeal.' We believe counsel to be in error because the scope of the review by a District Court of findings of fact made by a referee is established by Order No. 47 of the General Orders in Bankruptcy, 11 USCA following section 53, and the scope of our review of a District Court in cases like the present is established by Rule 52 (a) of the Federal Rules of Civil Procedure, 28 USCA following section 723c. Order No. 47, supra, provides that the District Court in cases like the present is established by Rule 52(a) of the Federal Rules of Civil Procedure, 28USCA following section 723c. Order No. 47, supra, provides that the District Court 'shall accept his (a referee's) findings of fact unless clearly erroneous', and Rule 52(a), supra, pro-

vides that we shall not set aside a District Court's findings of fact 'unless clearly erroneous'. The applicability of Order No. 47 of the District Court in this case is obvious. The applicability to us of Rule 52(a) is by force of Rules 1 and 81 (a) of the Federal Rules of Civil Procedure, and Orders No. 36 and 37 of the General Orders in Bankruptcy. (Citations.)

"Therefore, whatever the rule may formerly have been, *the scope of our review of findings of fact made by a referee and adopted by a District Court is now narrowly limited.* The question for us in this case is whether the District Judge committed clear error in accepting the Referee's findings of fact for the reason that he was unable to say that those findings were clearly erroneous."

A reading of the opinion of the Circuit Court of Appeals in the case at bar impels the conclusion that the decision is based entirely upon the conclusion by the Court that if it had been the trier of facts it would have determined the issue differently than was done by the Commissioner and the District Court. This is not the function of the court on appeal; and the decision thus departs from accepted procedure. The importance of this departure, as a practical matter, in the fair administration of justice has been touched upon in the petition, ante. Let it be emphasized, however, that unless litigants can rely upon the rule of appellate procedure, it will be necessary in all cases to insist upon argument of the facts in every

appeal to a Circuit Court, with resultant increase of expense to litigants, and labor for the courts.

The precise point is covered in *Bostian v. Levich,* 134 F. (2d) 284. In that case a trustee in bankruptcy sought to recover, as preferences, the amounts of certain checks issued by the bankrupt to his father-in-law. The trial judge, to whom the case was tried without a jury, found that the proceeds of the checks were not received in payment of antecedent credits or loans to the bankrupt but in contemporaneous value exchanges. There were "other circumstances and incidents in the record which are capable of varying interpretations. * * * Neither singly nor collectively would these circumstances or the evidence generally permit an absolute declaration on our part that the check exchanges were credit or loan transactions." The Court then summarized the point petitioners here assert:

> "While the trial Court might well, no doubt, have reached a different conclusion, we have no right to declare that its findings here are clearly erroneous within the intendment of Federal Rules of Civil Procedure, rule 52a, 28 USCA following section 723c, and the judgment must accordingly be affirmed."

III. WHERE THE RECORD ON APPEAL DOES NOT INCLUDE THE EVIDENCE ON WHICH FINDINGS WERE BASED, FINDINGS MUST BE ACCEPTED AS CORRECT.

In the case at bar the appellant below did not request that the transcript of testimony before the Conciliation Commissioner be incorporated in the record on appeal. (R. 12-13.) In justified reliance on the sufficiency of the findings and conclusions of the Commissioner and the District Court, under the universally accepted rules of procedure and scope of review on appeal, petitioners here did not seek to augment the record. There was no apparent need whatever to go beyond the full and careful findings of the Commissioner.

Petitioners were more than justified in this assumption, because the Ninth Circuit Court itself had declared these principles in the case of *Bernards v. Johnson*, 103 F. (2d) 567. That was a case involving the effect of foreclosure and title to property. The Court, (Denman, Mathews and Healy, Circuit Judges) speaking through Justice Mathews, said; at page 571:

> *"The orders appealed from are based on findings. The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct."*

In *Irving Trust Co. v. Nelson*, 59 F. (2d) 553, 559, it is said:

> "Where the facts upon which an order is based are in dispute, this Court must assume, *in the absence of a record containing all the evidence*, that the findings upon which the order is based are justified."

CONCLUSIONS.

Your petitioners respectfully submit that the final determination by this Court of the questions involved in this case is of the utmost importance to the rights of litigants in the federal courts, particularly litigants of limited means such as petitioners in bankruptcy and under the agricultural composition and extension provisions of the bankruptcy act.

The decision of the Circuit Court of Appeals herein is contrary to the law of California on the important question of forfeitures under conditional contracts for the sale of land; it is contrary to the decisions of this Court and Rule 52a of FRPC in setting side findings and conclusions of the trier of facts without a clear showing of error; and it is contrary to the established practice and rule as to scope of review on appeal.

Unless these errors be corrected by this Court, the effect will be to create uncertainty in the law of conditional sales of land in California, and to cause confusion in the course of judicial proceedings and make it incumbent on all litigants to go to unnecessary and unusual expense to protect their interests on appeal.

Finally, the decision in the instant case opens wide the field and opportunity to circumvent the salutary provisions of the agricultural composition and extension provisions of the National Bankruptcy Act. The importance of this phase of the problem cannot be overemphasized as bearing on the sound economy of this nation.

It is respectfully submitted that the writ prayed for be granted.

Dated, San Francisco, California,
March 12, 1945.

W. N. MULLEN,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of March, 1945.

_____

_____

Attorneys for Respondent.

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1049

DWIGHT D. KINNE, CHARLES H. KINNE, and LELIA M. KINNE,
Petitioners,

vs.

STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

RESPONDENT'S REPLY TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI.

O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,
1 Montgomery Street, San Francisco 4, California,
Attorneys for Respondent.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent hereby files its reply to the petition for a writ of certiorari recently filed herein, and shows as follows:

QUESTIONS PRESENTED.

The statement of questions presented by petitioners is not a full and accurate statement of the questions involved, and respondent therefore re-states the questions as follows:

1. Where a conditional sales contract for the sale of farm land in California calls for installment payments and makes time of the essence, and where the purchaser has been in default for over eight years on a contract calling for the payment of $3000 together with interest and taxes, on account of which only the sum of $325 has been paid in the last eight years, and where two notices of default and demand for compliance with the terms of the sale within a reasonable time were served without the buyer making any payments in response thereto, has the Circuit Court of Appeals erred in reversing the order of the District Court confirming the order of the Conciliation Commissioner which excused the defaulting purchaser?

2. Have the petitioners shown any ground of importance for this Court granting the writ of certiorari?

STATEMENT OF CASE.

The law and the facts in this case are very simple and, in spite of the strenuous complaints of petitioners that the full record of the case is not before this Court, we submit that the facts in the transcript of record now before this Court, give all the information neces-

sary to justify this Court in denying the petition for a writ of certiorari.

There is a full summary of the facts in the transcript of record, in the document entitled "Order Denying Petition to Strike Debtors Real Property from the Schedule" made by the Conciliation Commissioner, found on pages 17 to 30 of the transcript. The petitioners nowhere question the accuracy of any of the facts stated in this order, and the facts stated in the opinion of the Circuit Court of Appeals are based on the facts found in said order denying petition.

The only decisions necessary to consider in sustaining the order of the Circuit Court of Appeals, are the leading case of *Federal Farm Mortgage Co. v. Davis,* 132 F. (2d) 663, relied on chiefly by the Circuit Court of Appeals, and the recent California cases re-stating the correct rule as to the forfeiture of conditional sales contracts in California, of *Sawyer v. Sterling Realty Co.,* 41 Cal. App. (2d) 715, and *Kelso v. Ulrich,* 67 Adv. Cal. App. Reports 800, 155 Pac. (2d) 407 (decided on January 26, 1945), which rule was originally laid down in the leading case of *Glock v. Howard,* 123 Cal. 1.

Petitioners claim that the case of *Boone v. Templeman,* 158 Cal. 290, requires that the Court give them equitable relief. We fully subscribe to the doctrine found in the *Boone* case, but call this Court's attention to the fact that petitioners have overlooked the very important fact in that case that Boone, the land purchaser, before asking reinstatement of his contract

after his default in payment *"offered to pay in full"*, which fact is stated on page 22 of petitioners' brief in support of the petition for writ of certiorari. (Italics ours.) In the present case no such offer was ever made.

The case of *Kelso v. Ulrich, supra*, summarizes the California law on the subject of conditional sales contracts where time is made of the essence, and refers to the recent case of *Sawyer v. Sterling Realty Co.*, 41 Cal. App. (2d) 715, at 724. In the *Kelso* case, a certain alleged equitable defense was raised against the vendor, similar to the defense urged by petitioners before the Conciliation Commissioner. In the *Kelso* case, as well as in the *Sawyer* case, the Courts made it clear that where time is made of the essence, nothing less than tender of the full amount due would excuse the purchaser's default after notice of default and demand for performance was served upon the purchaser.

NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT OF CERTIORARI APPEARS IN THE PETITION THEREFOR.

In Rule 38, subdivision 5, of the Rules of this Court, the character of reasons are stated which this Court will consider in granting a petition for writ of certiorari, they being three in number. Without reciting them, it is clear on the face of the petition that none of the three reasons stated by this Court appear in the petition or in the brief in support thereof. It is clear from the petition itself that there is no decision of a

State Court here involved, within the meaning of Rule 38, subdivision 5(a); that the Circuit Court of Appeals in this case has not rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter, nor do petitioners claim that has been done; nor has it decided an important question of local law in a way probably in conflict with applicable local decisions; nor has it decided an important question of federal law which has not been but should be settled by this Court; nor has it so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision. On the contrary, we have shown that the cases of *Kelso v. Ulrich, supra,* and *Sawyer v. Sterling, supra,* fully support the rule of local law applied by the Circuit Court of Appeals. Lastly, there is no decision of the United States Circuit Court of Appeals for the District of Columbia here involved.

CONCLUSION.

It is undisputed that petitioners have had possession of the property involved in this case from March 24, 1937, the date of the execution of the conditional sales agreement, until the present time—eight years later—and that respondent during that period has received at most only $325 as payments on account of the principal, interest and taxes due under said contract, and that petitioners have never at any time tendered the moneys due under said contract, in spite of the service

of two written notices of default and demand for performance. It is therefore crystal clear that the Circuit Court of Appeals made the only decision possible under the undisputed facts, all of which appear in the transcript of record before this Court, and in accordance with the unbroken rules of law laid down in California, starting with *Glock v. Howard,* 123 Cal. 1, and ending with *Kelso v. Ulrich,* 67 A.C.A. 800 (decided on January 26, 1945). In fact it is very obvious that petitioners have resorted to the Courts in this matter for the sole purpose of getting additional free use of the premises, and to remove the crops grown thereon without paying for them. If petitioners were acting in good faith they should easily have been able to refinance their small loan in eight years. If not they should be compelled forthwith to surrender the land as they have been unable to meet the vendor's very lenient purchase terms in an unreasonably long time.

Dated, San Francisco, California,
April 11, 1945.

Respectfully submitted,
O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,
Attorneys for Respondent.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of April, 1945.*

_____

_____

_____

Attorneys for Petitioners.